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ARTICLE 32 — ACCELERATED JUDGMENT

Collateral Estoppel: Determination made in criminal prosecution may not be relitigated in subsequent civil action.

Under the doctrine of collateral estoppel, an identical issue necessarily adjudicated in a prior action may not be relitigated in a subsequent action if a party had a full opportunity to contest the previous determination.⁷⁹ The bar may be raised by one who was not a party to the first action.⁸⁰ In New York, for reasons that are primarily historical,⁸¹ however, the doctrine has not been applied where the prior determination was made in a criminal prosecution,⁸² although a criminal conviction is prima facie evidence of the issues necessarily decided previously in a subsequent civil action.⁸³

In *Vavolizza v. Krieger*,⁸⁴ the Appellate Division, First Department, removed this restriction, holding that the plaintiff, who had previously pleaded guilty in a federal criminal action, was collaterally estopped from maintaining a subsequent malpractice action against his attorney therein for allegedly coercing him to plead guilty, on the basis of the federal court's denial of the plaintiff's motion to withdraw his plea.⁸⁵

In opposing the defendant's motion to dismiss on the ground of collateral estoppel, the plaintiff did not contend that he had not been given a full opportunity to prove his allegation of coercion; he argued that since there had been no hearing on the motion to withdraw the plea, the doctrine should not apply. In rejecting this argument, the court stated that it is not essential that testimony be taken.⁸⁶ The court

⁷⁹ *Schwartz v. Public Adm'r*, 24 N.Y.2d 65, 246 N.E.2d 725, 298 N.Y.S.2d 955 (1969), discussed in *The Quarterly Survey*, 44 ST. JOHN'S L. REV. 135, 144 (1969); *Vavolizza v. Krieger*, 39 App. Div. 2d 446, 336 N.Y.S.2d 748 (1st Dep't 1972). See Rosenberg, *Collateral Estoppel in New York*, 44 ST. JOHN'S L. REV. 165 (1969).

⁸⁰ *Vavolizza v. Krieger*, 39 App. Div. 2d 446, 448, 336 N.Y.S.2d 748, 750 (1st Dep't 1972), citing *Israel v. Wood Dolson Co.*, 1 N.Y.2d 116, 134 N.E.2d 97, 151 N.Y.S.2d 1 (1956), discussed in *The Quarterly Survey*, 44 ST. JOHN'S L. REV. 135, 147-48 (1969).

⁸¹ In *Schindler v. Royal Ins. Co.*, 258 N.Y. 310, 313, 179 N.E. 711 (1932), the Court of Appeals stated the reasons as "the dissimilarity of object, procedure and degree and elements of proof in the two trials"

⁸² See, e.g., *Clark v. Nannery*, 292 N.Y. 105, 54 N.E.2d 31 (1944); *In re Rechtschaffen's Estate*, 278 N.Y. 336, 16 N.E.2d 357 (1938) (dictum); *Schindler v. Royal Ins. Co.*, 258 N.Y. 310, 179 N.E. 711 (1932); *Casler v. State*, 33 App. Div. 2d 305, 307 N.Y.S.2d 695 (4th Dep't 1970).

⁸³ See, e.g., *Schindler v. Royal Ins. Co.*, 258 N.Y. 310, 179 N.E. 711 (1932); *Uzenski v. Fitzsimmons*, 10 App. Div. 2d 890, 201 N.Y.S.2d 358 (2d Dep't), appeal denied, 11 App. Div. 2d 716, 205 N.Y.S.2d 885 (2d Dep't 1960).

⁸⁴ 39 App. Div. 2d 446, 336 N.Y.S.2d 748 (1st Dep't 1972) (3-2).

⁸⁵ The plaintiff declined to withdraw his guilty plea at the time of his sentence. Six months later, he sought to vacate the plea. He had changed attorneys prior to sentencing. *Id.* at 447, 336 N.Y.S.2d at 750.

⁸⁶ *Id.* at 448, 336 N.Y.S.2d at 751.

also rejected the plaintiff's contention that the principle of collateral estoppel cannot be applied where the prior proceeding was a criminal prosecution, noting that mutuality of estoppel is no longer required⁸⁷ and finding it "very significant"⁸⁸ that in *Schindler v. Royal Insurance Co.*,⁸⁹ the Court of Appeals stated that in the absence of that doctrine, a prior criminal determination could be the basis of collateral estoppel in a subsequent civil action.

The dissent, which contested the majority's finding that the issues in this proceeding had been previously adjudicated, argued that the essence of the plaintiff's malpractice "seems to be [that it was] bad legal advice to take a plea of guilty. . . . [P]laintiff might, given the opportunity, be able to prove that he had available a good defense to the indictment."⁹⁰

It is laudable that *Vavolizza* eliminated the anachronistic distinction⁹¹ between a criminal determination and a civil proceeding made in prior New York cases in applying the doctrine of collateral estoppel. In lieu of granting the defendant's motion to dismiss, however, it would have been preferable for the court to admit the denial of the plaintiff's motion to withdraw his plea in order to establish that the plea had not been coerced and then to permit the plaintiff to litigate the broader question of the defendant's alleged malpractice on grounds other than coercion.

CPLR 3215(a): Court sua sponte dismisses complaint for improper service in response to plaintiff's motion for default judgment.

CPLR 3215(c) provides for dismissal of a complaint as abandoned, in the discretion of the court, where the plaintiff has failed to proceed to enter a default judgment for more than one year after default.⁹² In such a case, *Career Placements Inc. v. Sibilis*,⁹³ the Nassau County District Court held that the summons was not properly served where the process server's affidavit failed to state facts constituting diligent effort to effect personal service⁹⁴ before resort was had to substituted

⁸⁷ *Id.* at 449, 336 N.Y.S.2d at 752.

⁸⁸ *Id.* at 448, 336 N.Y.S.2d at 751.

⁸⁹ 258 N.Y. 310, 179 N.E. 711 (1932).

⁹⁰ 39 App. Div. 2d at 449, 336 N.Y.S.2d at 752.

⁹¹ In federal cases, no such distinction is made. *See, e.g., Yates v. United States*, 354 U.S. 298 (1957) (dictum); *Emich Motors Corp. v. General Motors Corp.*, 340 U.S. 558 (1951); *United States v. Oppenheimer*, 242 U.S. 85 (1916); *United States v. Fabric Garment Co.*, 366 F.2d 530 (2d Cir. 1966); *United States v. Guzzone*, 273 F.2d 121 (2d Cir. 1959).

⁹² 7B MCKINNEY'S CPLR 3215, commentary at 870-71 (1970); 4 WK&M ¶¶ 3215.13, 3215.14, 3215.15.

⁹³ 71 Misc. 2d 345, 336 N.Y.S.2d 83 (Dist. Ct. Nassau County 1972).

⁹⁴ *Id.*, 336 N.Y.S.2d at 84, citing *Blatz v. Benshine*, 53 Misc. 2d 352, 278 N.Y.S.2d 533 (Sup. Ct. Queens County 1967), discussed in *The Quarterly Survey*, 42 ST. JOHN'S L. REV.